LIBRARY
SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
SEP 13 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1971

No. .....71 - 372

LAW RESEARCH SERVICE, INC. and
ELLIAS C. HOPPENFELD,

Petitioners,

against

BLAIR & CO., GRANBERY, MARACHE,
INCORPORATED,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GABRIEL I. LEVY,
Attorney for Petitioners,
350 Fifth Avenue,
New York, N. Y. 10001.
212 736-2572

TABLE OF CONTENTS

	PAGE
Opinions of the Court Below	1
Jurisdiction	2
Question Presented	2
Statutory Provisions Involved	2
Statement of the Case	2
A. Jurisdiction	3
B. The Underlying Judgment	3
C. Blair's Motion for Contribution	4
D. The Decision of the District Court Granting Contribution	4
Reasons Relied on for the Allowance of the Writ	5
Conclusion	12
Appendix "A"—Statutes	13
Appendix "B"—The Opinion and Order of the District Court	16
Appendix "C"—The Judgments of the District Court for Contribution	22
Appendix "D"—Decision of the United States Court of Appeals for the Second Circuit Affirming the Judgments for Contribution	24

AUTHORITIES

Cases

PAGE

de Haas v. Empire Petroleum Company, D. Colo. 1968, 286 F. Supp. 809 ..... 7, 11n

D. Colo. 1969, 302 F. Supp. 647 ..... 10n, 11n

10th Cir. 1970, 435 F. 2d 1225 ..... 8n, 11n

Erie R. Co. v. Tompkins, 304 U. S. 64 (1938) 8n

Federal Marine Terminals, Inc. v. Burnside Shipping Co., Ltd., 394 U. S. 404 (1969) 5

Fischman v. Raytheon Mfg. Co., 2nd Cir. 1951, 188 F. 2d 783 ..... 10n

Fratt v. Robinson, 9th Cir. 1953, 203 F. 2d 627 .... 10n

Globus v. Law Research Service, Inc., S. D. N. Y. 1968, 287 F. Supp. 188 ..... 3, 5

2nd Cir. 1969, 418 F. 2d 1276, certiorari denied 397 U. S. 913 (1970) 3, 5, 10n

Halcyon Lines v. Haenn Ship Ceiling and Refining Corp., 342 U. S. 282 (1952) 6, 7, 8n, 9

Hooper v. Mountain States Securities Corp., 5th Cir. 1960, 282 F. 2d 195 ..... 8n

Kardon v. National Gypsum Co., E. D. Pa. 1946, 69 F. Supp. 512 ..... 10n

Knell v. Feltman, D. C. Cir. 1949, 174 F. 2d 662 .. 5n

McFall v. Compagnie Maritime Belge (Lloyd Royal) S.A., 304 N. Y. 314, 107 N. E. 2d 463 (1952) 8, 9

PAGE

Merryweather v. Nixan, 8 Term Rep. 186, 101 Eng. Rep. 1337 (K. B. 1799) 5

State Mutual Life Assurance Company of America v. Peat, Marwick, Mitchell & Co., S. D. N. Y. 1969, 49 F. R. D. 202 ..... 10n

Union Stock Yards Co. v. Chicago B. & Q. R. Co., 196 U. S. 217 (1905) 16

Valley Rolling Mills, Inc. v. Feldman, 264 App. Div. 717, 34 N. Y. S. 2d 832, 1st Dept. 1942 ... 5n, 9

Statutes

Securities Act of 1933

§11, 15 U. S. C. §77k. 8, 13

§12, 15 U. S. C. §77l. 3, 8n

§15, 15 U. S. C. §77o. 8n

§17(a), 15 U. S. C. §77q.(a) 3, 5, 10n, 13

§22, 15 U. S. C. §77v. 3, 11n

Securities Exchange Act of 1934

§9, 15 U. S. C. §78i. 8, 14

§10(b), 15 U. S. C. §78j.(b) 3, 4, 5, 10n, 14

§15, 15 U. S. C. §78o. 3

§18, 15 U. S. C. §78r. 8, 15

§20, 15 U. S. C. §78t. 8n

§27, 15 U. S. C. §78aa. 3

PAGE

28 U. S. C. (1254 1) 2, 13

Rules of the United States Supreme Court

Rule 19 ..... 11n

State of New York Civil Practice Law and Rules

1401 ..... 5n, 9, 15

Treatises

Weinstein-Korn-Miller, New York Civil Practice

¶1401.04 ..... 5n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

LAW RESEARCH SERVICE, INC. and ELLIAS C. HOPPENFELD,

Petitioners,

against

BLAIR & CO., GRANBERY, MARACHE, INCORPORATED,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, *The Chief Justice and Associate Justices of the Supreme Court of the United States*:

Petitioners, Law Research Service, Inc. and Ellias C. Hoppenfeld respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on June 14th, 1971, affirming the judgments of the United States District Court for the Southern District of New York, entered on October 8th, 1970, which directed contribution between intentional joint tortfeasors, without any statute so providing.

Opinions of the Court Below

The opinion of the Court of Appeals is reported in 442 F. 2d 1346. It is printed in Appendix "D", hereto, *infra*,

p. 24. The opinion of the District Court for the Southern District of New York is reported in 318 F. Supp. 955 It is printed in Appendix "B", hereto, *infra*, p. 16.

Jurisdiction

The judgment of the Court of Appeals was entered on June 14th, 1971. The jurisdiction of this Court is invoked under Title 28 U. S. C. §1254(1).

Question Presented

Whether or not a federal court, can direct contribution between intentional joint tortfeasors under the Securities Act of 1933 and the Securities Exchange Act of 1934, when the sections under which the underlying judgment was awarded makes no provision for contribution and there is no state statute authorizing the recovery of contribution in such type case?

Statutory Provisions Involved

The pertinent statutory provisions are printed in Appendix "A", *infra*, p. 13.

Statement of the Case

The underlying lawsuit was brought in the United States District Court for the Southern District of New York, by thirteen plaintiffs under the anti-fraud provisions of the Securities Act of 1933 (the 1933 Act) and the Securities Exchange Act of 1934 (the 1934 Act) against Law Research Service, Inc. (LRS) and Ellias C. Hoppenfeld (Hoppenfeld), the petitioners herein and Blair & Co., Granbery, Marache, Incorporated (Blair), the respondent herein, all of whom were the defendants therein.

A. Jurisdiction

The jurisdiction of the District Court was founded under §22 of the 1933 Act, 15 U. S. C. §77v. and §27 of the 1934 Act, 15 U. S. C. §78aa. as amended.

B. The Underlying Judgment

The complaint alleged violations by all of the defendants of §17(a) of the 1933 Act, 15 U. S. C. §77(q.)(a) [Appendix "A", *infra*, p. 13], §10(b) of the 1934 Act, 15 U. S. C. §78j.(b) [Appendix "B", *infra*, p. 14], and the commission of common law fraud. Additionally, the complaint alleged violations by Blair of §12(2) of the 1933 Act, 15 U. S. C. §77l.(2) and §15(c) of the 1934 Act, 15 U. S. C. §78o.(c).

The jury found that all of the defendants had violated §§17(a) and 10(b), but had not committed common law fraud. It also found that Blair had violated §§12(2) and 15(c). The jury awarded the plaintiffs compensatory damages against all of the defendants under §§17(a) and 10(b) [1] and punitive damages under §17(a) against Blair and Hoppenfeld. No punitive damages were awarded against LRS. The opinion of the trial court is reported in 287 F. Supp. 188, S. D. N. Y. 1968 (*Globus* v. *Law Research Service, Inc.*).

The defendants then appealed to the United States Court of Appeals for the Second Circuit, which affirmed the judgment for compensatory damages and reversed so much of the judgment as awarded punitive damages against Blair and Hoppenfeld under §17(a). The opinion of the Court of Appeals is reported in 418 F. 2d 1276, 2nd Cir. 1969 (*Globus* v. *Law Research Service, Inc.*). Plaintiffs then petitioned this Court for certiorari which was denied 397 U. S. 913 (1970).

---

[1] The jury found all of the defendants jointly and severally liable and implicit in such finding was that each of such defendants was an *intentional* joint tortfeasor (287 F. Supp. at 193; 418 F. 2d at 1288, 1291).

C. Blair's Motion for Contribution

On May 8th, 1970 Blair, being jointly and severally liable under the judgment for compensatory damages paid it in full. On June 24th, 1970 Blair demanded contribution on a pro rata basis of one third each from both LRS and Hoppenfeld. On July 24th, 1970 Blair moved the District Court for a judgment for contribution against both LRS and Hoppenfeld.

D. The Decision of the District Court Granting Contribution

On October 7th, 1970, Judge Marvin E. Frankel granted Blair's motion for contribution and directed the Clerk of the Court to enter judgments against LRS and Hoppenfeld, each in the amount of one-third of the amount of the judgment paid by Blair to the plaintiffs. The Clerk of the United States District Court for the Southern District of New York, entered such judgments on October 8th, 1970 (Appendix "C", *infra,* p. 22).

In granting Blair's motion for judgments of contribution against LRS and Hoppenfeld, Judge Frankel concluded that "the general drift of the law today is toward the allowance of contribution among joint tortfeasors" (Appendix "B", *infra,* p. 19) and "that contribution should be permitted" even though Section 10(b) does not "contain express provisions for contribution among intentional wrongdoers" (Appendix "B", *infra,* p. 20) since LRS and Hoppenfeld "may not effectively nullify their 'liability for compensatory damages' by leaving the whole of the burden to" Blair (Appendix "B", *infra,* p. 21).

The Court of Appeals affirmed Judge Frankel's award of contribution in open court "on the basis of his opinion, reported at 318 F. Supp. 955 (1970)" agreeing "with both his result and reasoning" (Appendix "D", *infra,* p. 26).

Reasons Relied on for the Allowance of the Writ

The District Court's decision ignores and is in conflict with the common law, the teachings and the decisions of this Court and the law of the state of the forum.

The jury found all three defendants jointly and severally liable as intentional joint tortfeasors under §17(a) of the 1933 Act and §10(b) of the 1934 Act.[2] Neither §17(a) or §10(b) makes any provision for contribution between joint tortfeasors nor is there any statute of the State of New York, the State of the forum authorizing the recovery of contribution in such type cases.[3]

It has been firm established since 1799 that courts exercising a common law jurisdiction cannot on their own initiative create an enforceable right of contribution as between intentional joint tortfeasors. The common law rule that there shall be no contribution between intentional tortfeasors evolves from *Merryweather* v. *Nixan,* 8 Term Rep. 186, 101 Eng. Rep. 1337 (K. B. 1799).[4] In the United

---

[2] 287 F. Supp. at 192, 193; 418 F. 2d at 1283, 1288.

[3] Both §§17(a) and 10(b) are anti-fraud statutes, the violation of which requires scienter on the part of the violators [Appendix "A", *infra,* pp. 13, 14; *Globus* v. *Law Research Service, Inc.,* 418 F. 2d at 1291]. The only New York Statute authorizing contribution between joint tortfeasors is §1401 of the Civil Practice Law and Rules, which limits such contribution to actions for "personal injury or property damage" [Appendix "A", *infra,* p. 15]. §1401 is not available in actions for fraud or deceit (*Valley Rolling Mills, Inc.* v. *Feldman,* 264 App. Div. 717, 34 N. Y. S. 2d 832, 1st Dep't. 1942; cf. 2A *Weinstein-Korn-Miller, New York Civil Practice* ¶1401.04).

[4] The plaintiff and defendant in that case had injured a mill by taking or damaging its machinery and the plaintiff having satisfied the judgment of the mill owner sued for contribution. The trial judge non-suited on the ground that "no contribution could by law be claimed by joint wrongdoers." On appeal, affirming the trial court, Kenyon, C. J. stated "that he had never before heard of such an action being brought, where the former recovery was for a tort." In 1799 the word "tort" was used only to describe wrongs of a willful or intentional charatcer. (cf. *Knell* v. *Feltman,* D. C. Cir. 1949, 174 F. 2d 662).

States this common law rule emerges from your decision in *Union Stock Yards Co.* v. *Chicago B. & Q. R. Co.*, 196 U. S. 217 (1905) when you held 196 U. S. at 224 that:

> ". . . the general principle of law is well settled that one of several wrongdoers cannot recover against another wrongdoer, although he may have been compelled to pay all the damage for the wrong done."

Almost fifty years after the *Union Stock Yard's* case in *Halcyon Lines* v. *Haenn Ship Ceiling and Refitting Corp.*, 342 U. S. 282 (1952) this Court made it clear that it had no intention of departing from the common law rule against contribution when you held 342 U. S. at 285 that:

> "In the absence of legislation courts exercising a common law jurisdiction have generally held that they cannot on their own initiative create an enforceable right of contribution as between joint tortfeasors.
>
> • • •
>
> "We have concluded that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action."

Recently in *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co., Ltd.*, 394 U. S. 404 (1969) in permitting impleader of a stevedoring contractor by a shipowner this Court indicated how deep-rooted in our jurisprudence is the common law rule against contribution when you stated 342 U. S. at 285 that:

> "This ruling is no wise a departure from our decision in Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U. S. 282, 285, 72 S. Ct. 277, 280, 96 L. Ed. 318, that we would not 'fashion new

judicial rules of contribution' between the shipowner and the stevedoring contractor as joint tortfeasors."

Despite the teachings of the common law and this Court, Judge Frankel on his "own initiative" attempted to fashion a new judicial rule of contribution under the 1933 and 1934 Acts. To reach this most undesirable result he completely ignored the deep rooted doctrine of this Court that you "would not fashion new judicial rules of contribution" even in those instances where you "would feel free to do so" and that any changes in the rules of contribution "should await congressional action."[5]

Judge Frankel departed from "traditional common law" on the ground that "the general drift of the law today is toward the allowance of contribution among joint tortfeasors."[6] However none of the cases relied on by Judge Frankel allowed contribution between intentional tortfeasors without statutory authorization and only permitted contribution to an unintentional tortfeasor. Specifically he relied on an isolated District Court case in Colorado[7] which held that:

> "Those sections of the [securities acts] which expressly provide for civil liability contain express provisions for contribution among intentional wrongdoers" and that "[s]ince the specific liability provisions of the Act provide for contribution, it

---

[5] *Halcyon Lines et al.* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. at 285 where you pointed out that "courts exercising jurisdiction in maritime affairs have felt freeer than common law courts in fashioning rules", however, you refused to fashion new judicial rules of contribution under maritime law.

[6] 318 F. Supp. at 957 [Appendix "B", *infra*, p. 19].

[7] *de Haas* v. *Empire Petroleum Company*, D. Colo. 1968, 286 F. Supp. 809, 815-816.

> appears that contribution should be permitted when liability is implied under Section 10(b)."[8]

The specific liability provisions which provide for contribution and relied upon in the *deHaas* case and by Judge Frankel are §11 of the 1933 Act, 15 U. S. C. §77k [Appendix "A" *infra*, p. 13], and §§9 and 18 of the 1934 Act, 15 U. S. C. §78i and §78r [Appendix "A" *infra*, pp. 14, 15]. However, there are other sections of the Securities Acts which expressly provide for civil liability without making any provision for contribution.[9] In view of such fact "and because Congress while acting in the field has stopped short of approving the rule of contribution urged" by Blair it was "inappropriate" and beyond the power of the court in the *deHaas* case and the District Court herein, both of which were courts exercising a common law jurisdiction "to do so".[10]

Since there is no federal statute providing for contribution between joint tortfeasors under §§17(a) and 10(b) the law which should have been applied by Judge Frankel and the Court of Appeals, is the law of the forum state in which the prohibited acts occurred, the State of New York.[11] The law of the State of New York closely parallels the teachings of this Court, as set forth by the New York Court of Appeals, its highest Court, in *McFall* v. *Compagnie Maritime Belge (Lloyd Royal) S. A.*, 304 N. Y. 314, 107 N. E. 2d 463 (1952) when in words strikingly

---

[8] 318 F. Supp. at 958 [Appendix "B", *infra*, p. 20].

[9] §12 of the 1933 Act, 15 U. S. C. §771 and §20 of the 1934 Act, 15 U. S. C. 78t, which provide for civil liability without contribution. In addition §15 of the 1933 Act 15 U. S. C. §77o provides for civil liability of controlling persons under both §11 providing for contribution and under §12 which makes no provision for contribution.

[10] *Halcyon Lines et al.* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. at 287.

[11] *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938); *Hooper* v. *Mountain States Securities Corp.*, 5th Cir. 1960, 282 F. 2d 195, 205; *de Haas* v. *Empire Petroleum Company*, 10th Cir. 1970, 435 F. 2d 1225.

similar to your holding in *Halcyon Lines, Inc.* v. *Haenn Ship Ceiling & Refitting Corp.*,[12] it held in 304 N. Y. at 327 that:

> "In the absence of statutory provision one of several wrongdoers who has been compelled to pay damages for the wrong committed, cannot obtain contribution from the others who participated in the commission of the wrong. Such is the rule recognized not only by the courts of this State, see, eg., Fox v. Western New York Motor Lines, 257 N. Y. 305, 178 N. E. 289, 78 A. L. R. 578, but by the federal courts, see Union Stockyards Co. v. Chicago, B & Q. R. Co., 196 U. S. 217, 224, 25 S. Ct. 226, 49 L. Ed. 453."

The only New York Statute which provides for contribution between joint tortfeasors is §1401 of the Civil Practice Law and Rules which applies only when the original action was one in which money damages were recovered "for a personal injury or for property damage" (Appendix "A", *infra*, p. 15) and "does not apply to a judgment for fraud and deceit".[13]

There being no New York statute which provides for contribution between intentional joint tortfeasors for violation of the anti-fraud sections of the Federal Securities Acts, wherein Congress has not specifically provided such a right, the attempt of Judge Frankel and the Second Circuit to fashion a new judicial rule of contribution on their own initiative to create an enforceable right of contribution betwen joint tortfeasors under the non-contribution sections of the Federal Securities Acts ignores and is in conflict not only with the common law and

---

[12] 342 U. S. at 285.

[13] *Valley Rolling Mills* v. *Feldman, supra;* Footnote 3, *ante* p. 5.

the decisions of this Court, but also with the firmly established New York rule.[14]

Although the Federal Securities Acts have been in effect for over 35 years and the anti-fraud provisions of both the 1933 and 1934 Acts have been the subject of much litigation involving civil liability under both the specific liability sections and the implied liability sections,[15] there does not appear to be any other reported case, other than the opinions of the lower courts herein, which *actually* permitted the entry of a judgment for contribution between

---

[14] The pattern presented in the instant case is very similar to that in *State Mutual Life Assurance Company of America* v. *Peat, Marwick, Mitchell & Co.*, S. D. N. Y. 1969, 49 F. R. D. 202. The defendant was charged with civil liability under §§17(a) and 10(b), the alleged violations having occurred in the State of New York, and maintained that it had a right to contribution from the third party defendant. The motion to strike the third party complaint was granted. At pp. 212, 213, the Court said:

> "Admittedly, there is authority in another district for recognizing a right to contribution in cases brought under Section 10(b) of the Securities Exchange Act of 1934, 15 U. S. C. §78j(b). de Haas v. Empire Petroleum Co., 286 F. Supp. 809 (D. Colo. 1968). *But I feel that to abandon the firmly established New York rule when Congress has not specifically provided such a right would run afoul of the Supreme Court's confessed dislike of judicial attempts to fashion new rules of contribution.* Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U. S. 282, 285, 72 S. Ct. 277, 96 L. Ed. 318 (1952)" [Emphasis supplied].

[15] §§17(a) and 10(b) are both implied liability sections and at least with respect to §10(b) it has consistently been held that a suit for damages may be maintained for its violation (*Fratt* v. *Robinson*, 9th Cir. 1953, 203 F. 2d 627; *Fischman* v. *Raytheon Mfg. Co.* 2nd Cir. 1951, 188 F. 2d 783; *Kardon* v. *National Gypsum Co.*, E. D. Pa. 1946, 69 F. Supp. 512; *deHaas* v. *Empire Petroleum Company*, D. Colo. 1969, 302 F. Supp. 647) and several courts have indicated that a private right of action will lie for the violation of §17(a) (*Globus* v. *Law Research Service, Inc.*, 2nd Cir. 1969, 418 F. 2d 1276, 1283, certiorari denied 379 U. S. 913 (1970).

intentional joint tortfeasors under a section of the Acts which makes no provision for contribution.[16]

It is important that the decision of the District Court and the Court of Appeals in the instant case be reviewed and reversed since the Court of Appeals in affirming the District Court has decided a Federal question in a way in conflict with applicable decisions of this Court, has decided an important question of state law in a way in conflict with applicable state law and has so far sanctioned a departure by a lower court from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.[17]

Moreover, the issue herein presented is of great importance to both Federal and State courts, which administer actions for civil liabilities brought under the Federal Securities Acts [18] who are now faced with the lower courts' decision herein which attempts to fashion a new judicial rule of contribution on their own initiative to create an enforceable right of contribution between joint tortfeasors under the non-contribution sections of the Federal Securities Acts, which ignores and is in conflict not only with the common law and the decisions of this court, but also with firmly established state law. Unless reviewed and

---

[16] The *deHaas* opinion relied upon by Judge Frankel only involved a motion of the third party defendant for summary judgment dismissing the third party complaint which was denied on the ground that a genuine issue of fact existed on the "question of contribution" (286 F. Supp. at 815). However, the opinion of the District Court after the trial (1969, 302 F. Supp. 647) and the subsequent opinion of the 10th Circuit (1970, 435 F. 2d 1223) clearly indicate that there was no judgment for contribution against the third party defendant.

[17] Rules of the United States Supreme Court, Rule 19.

[18] The state courts have concurrent jurisdiction with the district courts to enforce any liability under the 1933 Act, §22, 15 U. S. C. 77v.

reviewed by this Court, this new judicial rule of contribution fashioned by Judge Frankel on his own initiative could well flow over into the general field of tort law thereby destroying the long rooted doctrine which has existed since 1799 that courts exercising common law jurisdiction may not create an enforceable right of contribution as between joint tortfeasors without statutory enactment providing for such contribution.

CONCLUSION

For the foregoing reasons, it is urged this Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Dated: New York, N. Y.
September 10th, 1971

Respectfully submitted,

Gabriel I. Levy,
Attorney for Petitioners.

APPENDIX "A"

Statutes

28 U. S. C. §1254(1)

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

Securities Act of 1933

Section 11(f), 15 U. S. C. §77k.(f)

> "All or any one or more of the persons specified in subsection (a) of this section shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation."

Section 17(a), 15 U. S. C. 77q.(a)

> "It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly.
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission

to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice or course of business which operates or would operate as a fraud or deceit upon the purchaser."

Securities Exchange Act of 1934.

Section 9(e), 15 U. S. C. 78i.(e)

"* * *. Every person who becomes liable to make any payment under this sub-section may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment."

Section 10(b), 15 U. S. C. §78j.(b)

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or any facility of any national securities exchange.

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Appendix "A"

Section 18(b), 15 U. S. C. §78r.(b)

> "Every person who becomes liable to make payment under this section may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment."

State of New York, Civil Practice Law and Rules, §1401.

> "Where a money judgment has been recovered jointly against defendants in an action for a personal injury or for property damage, each defendant who has paid more than his pro rata share shall be entitled to contribution from the other defendants with respect to the excess paid over and above his pro rata share; provided, however, that no defendant shall be compelled to pay to any other such defendant an amount greater than his own pro rata share of the entire judgment. Recovery may be had in a separate action, or a judgment in the original action against a defendant who has appeared may be entered on motion made on notice in the original action."

APPENDIX "B"

The Opinion and Order of the District Court

GLOBUS, INC., *et al.*,

Plaintiffs,

v.

LAW RESEARCH SERVICE, INC. and ELLIAS C. HOPPENFELD,

Defendants,

and

BLAIR & CO., GRANBERY, MARACHE, INCORPORATED,

Defendant and Third-Party Plaintiff,

v.

PAUL WIENER,

Third-Party Defendant.

No. 65 Civ. 1694.

United States District Court,

S. D. New York.

Oct. 7, 1970.

Mudge, Rose, Guthrie & Alexander, New York City, for Blair & Co., Granbery, Marache, Inc.; Milton Black, Thomas Esposito, New York City, of counsel.

Julien, Glaser, Blitz & Schlesinger, New York City, for Law Research Service, Inc., and Ellias Hoppenfeld; Alfred S. Julien, New York City, of counsel.

Appendix "B"

FRANKEL, District Judge.

In this lawsuit, a prolific generator of nice questions, plaintiff purchasers of securities have recoved a judgment under the 1933 and 1934 Securities Acts, have been paid a reduced amount allowed by a modification on appeal, and have finally gone hence. There remains a dispute as to whether one defendant, Blair & Co., Granbery, Marache, Incorporated (Blair), having paid in full the amount of the judgment, may recover contribution from the two defendants—Law Research Service, Inc. (LRS), and Ellias C. Hoppenfeld—held jointly and severally liable with it. The underlying dispute and its outcome have been fully recounted in an opinion by Judge Mansfield, which held, *inter alia,* that there could be no award of indemnity to Blair, 287 F.Supp. 188 (S.D.N.Y.1968), and an opinion of the Court of Appeals, 2 Cir., 418 F.2d 1276 (1969), affirming on that and all other subjects except punitive damages, which it ruled unavailable under §17(a) of the 1933 Securities Act, 15 U.S.C. §77q(a), as well as under §10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b).[1] For our post-satisfaction purposes, the introductory summary of the case from the latter opinion, at 1278-1280, is enough:

> "The plaintiffs * * *, purchasers of the stock of * * * Law Research Services, Inc. * * *, initiated this action against LRS, its president Ellias C. Hoppenfeld, and the underwriter of LRS's public stock offer, Blair & Co. * * *. They contended that the (defendants) violated §17(a) of the Securities Act of 1933, §10(b) of the Securities Exchange Act of 1934, * * * and also committed common law fraud. The essence of their charge [was] that the

[1] Plaintiffs' petition for certiorari was denied, 397 U.S. 913, 90 S.Ct. 913, 25 L.Ed.2d 93 (1970).

offering circular prepared in connection with LRS's offer to sell 100,000 shares of its stock to the public under Regulation A of the Securities and Exchange Commission * * * was misleading since it prominently featured an attractive contract between LRS and the Sperry Rand Corp. (Sperry Rand) while failing to refer to a dispute between the two companies which had led Sperry Rand to terminate some of its services to LRS and in turn caused LRS to file suit against Sperry Rand. Moreover, the plaintiffs contended that Blair's actions violated §12(2) of the 1933 Act * * *.

"Judge Mansfield presided over a ten-day trial of these claims, to a jury in the Southern District of New York. The jury returned a verdict in favor of Blair, LRS and Hoppenfeld on the common law fraud claim but also decided that all three had violated both the Securities Act of 1933 and the Securities Exchange Act of 1934. Accordingly, the jury awarded compensatory damages to all plaintiffs totaling $32,591.14 and punitive damages against Hoppenfeld in the amount of $26,812.06 and Blair in the amount of $13,000, based on the violation of §17(a) of the 1933 Act.

"The jury was also called upon to deal with a cross-claim asserted by Blair against LRS, which rested on an indemnity clause included in the underwriting agreement, and against Hoppenfeld and a third-party defendant, Paul Wiener, Secretary-Treasurer of LRS, sounding in tort. At the same time, LRS and Hoppenfeld asserted a cross-claim against Blair, grounded on the same indemnity agreement. On all these cross-claims, the jury found for Blair.

"Blair and Hoppenfeld then moved unsuccessfully to have Judge Mansfield set aside the award

> of punitive damages. LRS, Hoppenfeld and Wiener, however, moved successfully to set aside the verdict on the cross-claims for indemnity and the entry of judgment, pursuant to Fed.R.Civ.P. 50(b). Judge Mansfield's careful and thorough opinion of July 19, 1968 is reported at 287 F.Supp. 188. In sum therefore, LRS, Hoppenfeld and Blair appeal[ed] from the award of damages to appellees and Blair appeal[ed] from the Judgment on the cross-claims and third-party action."

As has been mentioned, the judgment in its form following the appeal left Blair, LRS and Hoppenfeld jointly and severally liable to plaintiffs. The liability was for compensatory damages only. Blair, for reasons that are in part of interest now and are considered below, was held barred from recovering on its indemnity agreement with LRS. In substance and effect, while they argued before and continue to argue now about the degrees of their fault, they stood equally culpable and equally responsible.

Nevertheless, Blair alone, on May 8, 1970, paid plaintiffs the full amount of the judgment, plus interest and costs, or a total of $36,888.59, reserving any rights it might have to contribution from the others. When LRS and Hoppenfeld refused to contribute, Blair brought on the motion now before the court seeking judgment against them for one-third each of the sum paid to plaintiffs. The motion will be granted for reasons which follow.

(1) Departing from the rugged flintiness of traditional common law, the general drift of the law today is toward the allowance of contribution among joint tortfeasors. See, e. g., Gomes v. Brodhurst, 394 F.2d 465 (3rd Cir. 1968); Huggins v. Graves, 337 F.2d 486 (6th Cir. 1964); Knell v. Feltman, 85 U.S.App.D.C. 22, 174 F.2d 662 (1949); Bedell v. Reagan, 159 Me. 292, 192 A.2d 24 (1963); Best v. Yerkes,

247 Iowa 800, 77 N.W. 2d 23 (1956); Koenigs v. Travis, 246 Minn. 466, 75 N.W.2d 478 (1956); State Farm Mutual Automobile Ins. Co. v. Continental Cas. Co., 264 Wis. 493, 59 N.W.2d 425 (1953); Davis v. Broad St. Garage, 191 Tenn. 320, 232 S.W.2d 355 (1950); Quatray v. Wicker, 178 La. 289, 151 So. 208 (1933); Goldman v. Mitchell-Fletcher Co., 292 Pa. 354, 141 A. 231 (1928); N.Y. CPLR §1401 (1964); N.J.Rev.Stat. §2A:53A (1952); Pa.Stat.Ann. tit. 12 §§2082-2089 (1951); Md.Ann.Code art. 50, §§16-24 (1951). See generally, Prosser, Law of Torts, §47 (3rd Ed. 1964); Comment, Contribution Among Joint Tortfeasors, 44 Tex.L.Rev. 326, 326 n. 5 (1965) (cataloguing 24 States which have enacted statutes allowing contribution).

(2) More specifically, the securities acts underlying this case point clearly to the result Blair seeks.[2] As Judge Doyle pointed out in the *de Haas* case, *supra* note 2 at 815-816,

> "those sections of the [securities acts] which expressly provide for civil liability contain express provisions for contribution among intentional wrongdoers. [Citing §11 of the 1933 Act, 15 U.S.C. §77k, and §§9 and 18 of the 1934 Act, 15 U.S.C. §§78i and 78r.] Since the specific liability provisions of the Act provide for contribution, it appears that contribution should be permitted when liability is implied under Section 10(b). III Loss, Securities Regulation 1739-40, n. 178 (1961)."

This is simply a pertinent application of the general principle that the two statutes are to be administered *in pari materia*. E. g., *Globus* v. *Law Research Service, Inc.*, *supra*, 418 F.2d at 1286.

---

[2] There is no basis for doubting that the subject of contribution, like indemnity (as has been held in this case), is governed here by federal law. See, e. g., *de Haas* v. *Empire Petroleum Company*, 286 F. Supp. 809, 815-816 (D.Colo.1968).

Appendix "B"

(3) The prior decisions of Judge Mansfield and the Court of Appeals denying Blair's claim to indemnity support Blair's position now. A central ground for the ruling on indemnity was the judgment that allowing such means of absolution would dilute the deterrent impact of the securities laws, which seek "to encourage diligence, investigation and compliance with the requirements of the statute by exposing issuers and underwriters to the substantial hazard of liability for compensatory damages." *Id.* at 1289. The shoe is now on the other foot. If not identical, the mode of escape sought by LRS and Hoppenfeld is objectionable on substantially similar grounds. They may not effectively nullify their "liability for compensatory damages" by leaving the whole of the burden to the more prompt and diligent party with which they have been cast in joint and several liability.

There is an argument by LRS and Hoppenfeld that Blair should be compelled to proceed by a plenary action, not by motion. The reason is said to be that a law firm and auditors involved in the offering that led to the lawsuit should be brought in because they must share the liability. The argument is frivolous. The law firm and auditors were never brought in when Blair sought indemnity from its two present opponents. The law firm and auditors are not liable under the judgment as joint tortfeasors.

Other contentions in opposition to the motion, still less weighty, have been considered and rejected.

Blair's motion is granted, The Clerk of the Court will enter judgments for Blair against LRS and Hoppenfeld, each in the amount of $12,296.19 (the shares as computed by Blair), plus interest from May 8, 1970.

It is so ordered.

APPENDIX "C"

The Judgments of the District Court for Contribution

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

GLOBUS INC., BARBARA D'AMATO and MORTON GLOBUS, on behalf of themselves and all others similarly situated,

against

BLAIR & CO., GRANBERY, MARACHE INC., LAW RESEARCH SERVICE, INC., & ELIAS C. HOPPENFELD,

Defendants,

BLAIR & CO., GRANBERY, MARACHE INC.,

Defendant & Third/Party Pltff,

against

PAUL WIENER,

Third/Party Defendant.

U. S. District Court
Filed Oct. 8, 1970 S. D. of N. Y.

65 Civil 1694

Judgment

#70,993

The defendant/third/party plaintiff, Blair & Co., Granbery, Marache Incorporated having moved the Court for

judgment against the defendants Law Research Service, Inc., and Elias C. Hoppenfeld, for ⅓ each of the sum paid to plaintiff, Globus, Inc., et al., and the said motion having come on to be heard before the Honorable Marvin E. Frankel, United States Judge, and the Court thereafter on October 7, 1970, having handed down its opinion in favor of the defendant third party plaintiff, directing the Clerk to enter judgment, it is,

ORDERED, ADJUDGED AND DECREED: That defendant third party plaintiff, Blair & Co., Granbery, Marache Incorporated, have judgment against the defendants, Law Research Service, Inc., Elias C. Hoppenfeld, each in the amount of $12,296.19, plus interest from May 8, 1970.

Dated: New York, N. Y.
October 8, 1970

s/ JOHN LIVINGSTON
Clerk

APPENDIX "D"

Decision of the United States Court of Appeals for the Second Circuit Affirming the Judgments for Contribution

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 461—SEPTEMBER TERM, 1970.

(Argued June 14, 1971 Decided June 14, 1971.)

Docket No. 35861

MARTIN GLUCK, BARBARA D'AMATO, JOHN JACOBOWSKI and ELSIE JACOBOWSKI (jointly), ALFRED OPPENFELL, CONRAD TAPS, ROSE SLATTUS, JACK STEINPINK and STELLA STEINPINK (jointly), JACK STEINPINK, HAROLD ALENICK, CECILE GREENBERG and MURIEL PLOTKIN (jointly), BETTY SIMON, HARRY BALTERMAN and CHARLES SEMENTZ, JR.,

Plaintiffs,

—v.—

LAW RESEARCH SERVICE, INC. and ELLIS C. HOPPENFELD,

Defendants-Appellants,

and

BLUE & CO. (GREENBERG, MARAINE, INCORPORATED,

Defendant-Appellee and Third-Party Plaintiff,

—v.—

PAUL WIENER,

Third-Party Defendant.

Appendix "D"

Before:

MOORE and KAUFMAN, *Circuit Judges*, and TIMBERS, *District Judge.**

Appeal from judgments of the United States District Court for the Southern District of New York, Marvin E. Frankel, *Judge*, awarding contribution to Defendant-Appellee arising out of Appellants' and Appellee's joint and several liability for violations of the securities laws.

Affirmed.

ALFRED S. JULIEN (Julien, Glaser and Blitz, New York, N. Y.), *for defendants-appellants Law Research Service, Inc. and Ellias C. Hoppenfeld.*

MILTON BLACK (Thomas R. Esposito, Mudge Rose Guthrie & Alexander, New York, N. Y., of counsel), *for defendant-appellee.*

PER CURIAM:

We affirmed in open court Judge Marvin E. Frankel's award to Blair & Co., Granbery, Marache, Inc. (Blair) of contribution in the amount of one-third each from Law Research Service, Inc. (LRS) and Ellias C. Hoppenfeld (Hoppenfeld), Blair's co-defendants in an earlier stage of these proceedings.

In *Globus* v. *Law Research Service, Inc.*, 418 F.2d 1276 (1969), we affirmed a judgment entered against Blair, LRS, and Hoppenfeld for their joint and several liability pursuant to §17(a) of the Securities Act of 1933, 15 U.S.C.

* Chief Judge of the District of Connecticut, sitting by designation.

Appendix "D"

§77q(a) and §10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b) for failing to disclose material facts in connection with a public offering of the stock of LRS. 287 F. Supp. 188 (1968). Blair subsequently satisfied the judgment and by a motion in the District court sought to compel LRS and Hoppenfeld to pay their pro-rata shares of the judgment.

Judge Frankel awarded contribution. We agree with both his result and reasoning and affirm the judgment on the basis of his opinion, reported at 318 F. Supp. 955 (1970).